Goer Manufacturing Company, Inc. *and* Carpenters East Coast Industrial Council, Local 2221. Case 11–CA–20013

April 30, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On a charge filed by the Union on June 17, 2003, and subsequently amended on September 22, 2003, the General Counsel of the National Labor Relations Board issued a complaint on October 31, 2003, against Goer Manufacturing Company, Inc. (the Respondent). The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to continue in effect all terms and conditions of the parties' collective-bargaining agreement by refusing to pay unit employees vacation and perfect attendance pay earned prior to February 11, 2003. The Respondent filed an answer to the complaint, an amended answer, and a second amended answer. In the second amended answer, the Respondent admitted the factual allegations of the complaint but denied that it violated Section 8(a)(5) and (1) of the Act. The Respondent also asserted the following affirmative defenses: first, the Board's proceeding is stayed by the automatic stay provisions of Section 362 of the Bankruptcy Code;[1] second, the entry of an award or judgment by the Board against the Respondent would violate Section 362 of the Bankruptcy Code; third, the Respondent's actions with respect to the payment of vacation and perfect attendance pay were taken in accordance with the Bankruptcy Code's priority scheme; and fourth, the Board should defer to the final determination or adjudication of the claim filed by the Union with the Bankruptcy Court.

On January 14, 2004, the General Counsel filed a Motion for Summary Judgment. Thereafter, on January 16, 2004, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause. The Respondent did not file a response to the Board's Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

The Respondent's second amended answer admits the factual allegations in the complaint, including that it unilaterally discontinued vacation and perfect attendance pay, but asserts the affirmative defense that the Board's proceeding is stayed by the stay provisions of Section 362 of the Bankruptcy Code. It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within the exception to the automatic stay provision of the Bankruptcy Code for governmental units. See, e.g., *R. T. Jones Lumber Co.*, 313 NLRB 726, 727–728 (1994).

Accordingly, we grant the General Counsel's Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture of store fixtures in North Charleston, South Carolina. During the 12 months preceding the issuance of the complaint, the Respondent sold and shipped from its North Charleston, South Carolina facility products valued in excess of $50,000 directly to points outside the State of South Carolina. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times material, Gary Diamond occupied the position of plant manager, and has been, and is now, an agent of Respondent, acting on its behalf, and is a supervisor within the meaning of Section 2(11) of the Act.

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Respondent's North Charleston, South Carolina plant; excluding office clerical employees, professional employees, technical employees, over-the-road truck drivers, managerial employees, guards and supervisors as defined in the Act.

At all times since October 25, 1974, and continuing to date, the Union has been the representative of the unit employees for the purpose of collective bargaining of the

[1] 11 U.S.C. § 362.

[2] We find it unnecessary to address our dissenting colleague's contentions because they were not raised by any party to this proceeding and are therefore not procedurally before the Board. See *Nick & Bob Partners*, 340 NLRB No. 142, slip op. at 4 and fn. 5 (2003), citing, e.g., *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000).

unit employees, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the unit employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about June 12, 2002, the Respondent and the Union entered into a collective-bargaining agreement with respect to terms and conditions of employment of the employees in the unit described above, which agreement was to remain in effect until April 30, 2003.

On or about February 11, 2003, the Respondent unilaterally changed agreed-upon terms and conditions of employment of unit employees by failing to continue in effect all the terms and conditions of the agreement described above by refusing to pay unit employees vacation and perfect attendance pay earned prior to February 11, 2003.

The terms and conditions described above are mandatory subjects for the purposes of collective bargaining, and the Respondent engaged in the conduct described above without the Union's consent.

CONCLUSION OF LAW

By failing to continue in effect the terms and conditions of the Agreement by refusing to pay unit employees vacation and perfect attendance pay, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing to make contractually required vacation and perfect attendance payments earned prior to February 11, 2003, we shall order the Respondent to make its unit employees whole for any losses attributable to its unlawful conduct, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Goer Manufacturing Company, Inc., North Charleston, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Carpenters East Coast Industrial Council, Local 2221, the exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit, by unilaterally failing to continue in effect terms and conditions of the parties' collective-bargaining agreement by refusing to pay unit employees vacation and perfect attendance pay earned prior to February 11, 2003.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain collectively and in good faith with the Union as the exclusive bargaining representative of the unit. The unit is:

> All production and maintenance employees employed at the Respondent's North Charleston, South Carolina plant; excluding office clerical employees, professional employees, technical employees, over-the-road truck drivers, managerial employees, guards and supervisors as defined in the Act.

(a) Make unit employees whole for any losses attributable to the unlawful conduct in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in North Charleston, South Carolina, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by the Respondent at any time since February 11, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2004

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Unlike my colleagues, I would not grant the General Counsel's Motion for Summary Judgment. Not every contract breach rises to the level of an unfair labor practice. Here, the complaint involves essentially a mere collection action against a bankrupt employer that is financially unable to pay moneys due under the terms of a collective-bargaining agreement. I question whether such facts establish an unfair labor practice as a matter of law. Moreover, given the availability of alternative fora in which the Union can pursue contractual remedies, I do not believe the prosecution and adjudication of such claims is a wise or appropriate use of the Board's resources. Accordingly, I would dismiss the General Counsel's complaint.[1]

Dated, Washington, D.C. April 30, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[1] Other Board Members have voiced similar positions. See, e.g., Member Cowen's dissent in *Scapino Steel Erectors, Inc.*, 337 NLRB 992, 996–997 (2002); Chairman Van De Water's concurrence in *Capitol City Lumber Co.*, 263 NLRB 784, 787 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Carpenters East Coast Industrial Council, Local 2221, the exclusive collective-bargaining representative of our employees in the appropriate unit, by unilaterally failing to continue in effect terms and conditions of the collective-bargaining agreement by refusing to pay unit employees vacation and perfect attendance pay. The appropriate unit of our employees is the following:

> All production and maintenance employees employed at our North Charleston, South Carolina plant; excluding office clerical employees, professional employees, technical employees, over-the-road truck drivers, managerial employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, meet and bargain collectively and in good faith with the Union as the exclusive bargaining representative of the unit.

WE WILL make you whole for any losses attributable to our unlawful conduct, plus interest.

GOER MANUFACTURING COMPANY, INC.